

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 09-1034 JB

LEROY PEREA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Government's Opposed Motion to Continue Trial Setting, filed February 3, 2010 (Doc. 30). The primary issue is whether the Court should continue the February 16, 2010 trial for two weeks because the Assistant United States Attorney needs to try another case that same week. While the Court cannot move the trial, at this time, for two weeks, and while this case is older than the case that the AUSA wishes to try next week, the Court will nonetheless grant the motion because Perea no longer opposes the motion and because there is a possibility the Court's calendar may clear up as the weeks develop.

PROCEDURAL BACKGROUND

Perea is not in custody. Trial is currently set for February 16, 2010. On that same date, the AUSA in this case has a definite trial setting before the Honorable C. LeRoy Hansen, Senior United States District Judge, in United States v. Diaz, No. CR 09-1578.

The United States represents that there is no reasonable prospect for a negotiated settlement in United States v. Diaz, and the AUSA believes that United States v. Diaz will be tried on that date. The United States requests that the Court continue the February 16, 2010, trial setting. On Perea's

behalf, Assistant Federal Public Defender Richard A. Winterbottom opposed this request for a continuance at the time that the United States filed its motion.

The reason for Perea's opposition to this motion, according to Mr. Winterbottom, was that Perea is under stress with this case looming on the horizon. For that reason, the United States requests that the Court continue this case for two weeks. The United States further requests that, if the Court grants this motion, the Court also find, pursuant to 18 U.S.C. § 3161(h)(8)(A), that all the time from the date of the order granting the extension to the jury trial be excluded for the purposes of the Speedy Trial Act.

The United States contends that this short continuance will permit its AUSA to try United States v. Diaz and, at the same time, will not unreasonably prolong this case. The United States maintains that the ends of justice would be best served by granting the requested continuance, and that a continuance would outweigh the interests of the public and Perea in a speedy trial. Accordingly, the United States requests that the Court grant this motion to continue the current trial setting of February 16, 2010 and schedule this matter for trial approximately two weeks thereafter.

On Friday, February 5, 2010, the defendant in the Court's trial for the week of February 8, 2010 through February 12, 2010, pled guilty, see United States v. Yazzie, No. CR 09-1037, Clerk's Minutes (Doc. 85), and the Court offered the parties in this case that week to try the case. The parties declined the early setting. The Court then set the hearing on this motion for February 8, 2010, at 1:30 p.m.

Mr. Winterbottom is unavailable, because of a personal trip, from February 26, 2010 through March 5, 2010. The Court long ago gave a firm setting to the parties in a civil case for their trial from February 22, 2010 through February 25, 2010. See Sisneros v. Fisher, No. CIV 09-0213 JB/ACT, Minute Order, filed December 22, 2009 (Doc. 47). The Court also long ago gave

a firm setting to the parties in another civil case for their trial from March 8, 2010 to March 12, 2010. See Jonas v. Bd. of Comm'rs of Luna County, No. CIV 09-0091 JB/WPL, Order Vacating Pretrial Deadlines, Pretrial Conference and Scheduling This Matter for a Firm Trial Setting, filed January 15, 2010 (Doc. 45). The Court's March trailing docket (March 15, 2010 through March 19, 2010) has an older criminal case on it, which is a retrial of a hung jury last fall and counsel have represented they will be prepared for trial that week. See United States v. Rey, No. CR 07-1761 JB, Order Continuing Trial and Pretrial Motions Deadline, filed January 14, 2010 (Doc. 206). The Court has given the parties in a civil case a three-week firm setting from March 22, 2010 through April 9, 2010, see Wheeler Peak, LLC v. LCI2, No. CIV 07-1117 JB/WDS, and because that case is currently in mediation, the Court has already set another civil case as a backup for March 29, 2010 through March 31, 2010, see Carroll v. Los Alamos Nat'l Security LLC, No. CIV 08-0959 JB/ACT, Minute Order, filed January 28, 2010 (Doc. 61).

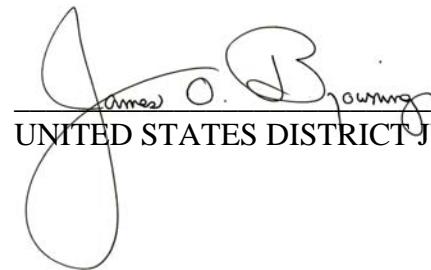
At the present time, the Court could place this case on the Court's trailing docket for April 12, 2010 through April 18, 2010. If, however, this case is not first on the docket, or the case cannot otherwise go that week, the Court has given a firm setting to another civil case from April 19, 2010 through April 21, 2010, see Pandolfo v. Labach, No. CIV 0231 JB/RHS, Minute Order, filed January 5, 2010 (Doc. 62), and the case that is a backup for March 29, 2010 through March 31, 2010 will be tried April 26, 2010 through April 28, 2010, if it is not tried in March.

On February 8, 2010, Mr. Winterbottom advised the Court that Perea no longer opposes the United States' motion. See Notice of Non-Opposition to Government Motion to Continue February 16, 2010, Trial Setting (Doc. 32). The Court's courtroom deputy clerk carefully explained to Mr. Winterbottom by telephone the Court's tight schedule, and Mr. Winterbottom stated that he still did not want to oppose the motion.

ANALYSIS

After weighing the best interests of the public and of Perea with the ends of justice, the Court finds that, for the reasons stated in the United States' motion, granting the continuance will strike a proper balance between the ends of justice and the best interests of the public and of Perea. Specifically, the United States' need to have continuity of counsel outweighs the public's and Perea's interests in having a trial next week. See 18 U.S.C. § 3161(h)(8). Moreover, Perea no longer opposes this motion, and there is one pending motion by Perea that the Court will hear on Friday, February 12, 2010. The Court will continue the trial until April 12, 2010 at 9:00 a.m. (trailing docket). Should the civil case with the three-week firm setting from March 22, 2010 through April 9, 2010 not proceed to trial, the Court is prepared to proceed with this case with a firm setting for April 5, 2010 at 9:00 a.m.

IT IS ORDERED that the Government's Opposed Motion to Continue Trial Setting is granted and continued until April 12, 2010 at 9:00 a.m. (trailing docket). The Court finds, pursuant to 18 U.S.C. § 3161(h)(8)(A), that all the time from the date of this order granting the extension until the trial is excluded for the purposes of the Speedy Trial Act.



James O. B. Bowring
UNITED STATES DISTRICT JUDGE

Counsel:

Gregory J. Fouratt
United States Attorney
Jack E. Burkhead
Assistant United States Attorney
Albuquerque, New Mexico

Attorneys for the Plaintiff

Richard A. Winterbottom
Assistant Federal Public Defender
Albuquerque, New Mexico

Attorney for the Defendant